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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 121

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, PETITIONER

v.

UNITED STATES OF AMERICA, AND FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1–12) is reported at 356 F. 2d 236. The Memorandum Opinion and Order of the Federal Communications Commission (J.A. 14–21)[1] is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 9, 1966, and the petition for a writ of

[1] "J.A." refers to the printed joint appendix filed in the court of appeals.

certiorari was filed on May 9, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

As part of its continuing surveillance over interstate telephone rates, the Federal Communications Commission held meetings with American Telephone and Telegraph Company (the Bell System) to review the Bell System's level of earnings. In these informal sessions, the Commission staff and Bell representatives presented unsworn testimony, exhibits, and argument. The Commission made no findings or other determination of the reasonableness of the rates, as a result of the meetings. However, it released a Public Notice stating that the Bell System proposed to submit revised tariffs which would result in major reductions in interstate telephone rates. The question presented is:

Whether the proposed rate reductions were approved or prescribed by the Commission within the meaning of Section 2(c) of the Administrative Procedure Act, 5 U.S.C. 1001(c), so as to require rule-making proceedings.

STATUTES INVOLVED

Pertinent sections of the Administrative Procedure Act (60 Stat. 237, 5 U.S.C. 1001–1011), the Communications Act of 1934 (48 Stat. 1064, as amended, 47 U.S.C. 151, *et seq.*), and the Judicial Review Act of 1950 (64 Stat. 1129, 5 U.S.C. 1031–1042) are set forth in the petition (Pet. App. 15–39).

STATEMENT

For many years the Federal Communications Commission has maintained an informal continuing surveillance over the interstate rates and earnings of the Bell System to determine whether existing interstate telephone rates appear to be reasonable or whether more formal proceedings are warranted (J.A. 18). As part of this process, the Commission and its Common Carrier Bureau staff met in informal session with representatives of the Bell System in July, September, and October 1964 (J.A. 17). Sitting *en banc,* the Commission heard presentations by Bell System officials, the Commission's staff, and a number of authorities in economics and finance, along with consultants in the regulatory field (J.A. 4–5, 17–19), concerning the various facets of the Bell System's operations (J.A. 5).

The participants made opening and closing arguments, offered unsworn testimony, and submitted various charts and exhibits. None of this data was formally introduced in evidence. A transcript of the presentations was prepared and made public by the Commission (J.A. 23–1008). At the conclusion of the review, the Commission discussed with the Bell System representatives questions raised by the presentations (J.A. 19).

On November 25, 1964, the Commission issued a Public Notice stating that the Bell Telephone Companies would submit tariffs proposing major reductions in interstate telephone rates which approximated 100 million dollars annually (J.A. 1–6). The Public

Notice indicated that this reduction was "made possible by the high level of business activity and increasing efficiencies in telephone operations" (J.A. 2–3). The Commission made no findings as to the appropriate rate of return to be allowed the Bell System on its interstate operations, nor did it find that the proposed revised rates would be just and reasonable (J.A. 2–6). It simply announced that the Bell System proposed to file the revised tariffs.

On December 24, 1964, petitioner, the Public Utilities Commission of the State of California, requested rehearing of the Commission's "action" in the Public Notice (J.A. 7–13). It alleged that the Commission had violated its duty under Sections 205(a) and 409 of the Communications Act, 47 U.S.C. 205(a) and 409, by taking "action which will result in a change in charges; classifications, regulations or practices without a full opportunity for affected ratepayers to be heard * * *" (J.A. 9–10). The petitioner did not claim that the proposed tariffs were unreasonable or request the Commission to stay or suspend them.

By Memorandum Opinion and Order released February 12, 1965 (J.A. 14–21), the Commission dismissed the petition for rehearing on the ground that it had not made any binding determination or taken any action with legal significance, since (J.A. 19):

> "The Public Notice issued on November 25, 1964 did not and could not bind anyone to any action, nor was it a ruling on the proposed tariff filing."

The Commission stated that the petitioner could request a formal hearing at any time by filing a com-

plaint alleging that the proposed rates were unreasonable, and noted that the petition for rehearing did not contain any information or other basis for holding that the new tariff schedules were unreasonable (J.A. 21).

Petitioner did not file a complaint with the Commission challenging the legality of the new tariff. Instead it petitioned the court below for review of the Commission's Order denying rehearing, contending that the Public Notice was "agency action" within the meaning of Section 2(g) of the Administrative Procedure Act, 5 U.S.C. 1001(g), and, specifically, was rule-making by "approval or prescription for the future" of interstate telephone rates. It argued that the Commission had violated Sections 4, 7 and 8 of the Administrative Procedure Act, 5 U.S.C. 1003, 1006, 1007, which provide for notice and an opportunity to be heard in agency proceedings where rule-making is involved, as well as Sections 204 and 205 of the Communications Act, 47 U.S.C. 204, 205, authorizing the Commission to prescribe rates after a full hearing.

The court below ruled that the proposed new rates were carrier-made, not Commission prescribed, and that the Administrative Procedure Act's rule-making requirements applied only to agency-made rates (Pet. App. 3–8). For the same reasons, it held (Pet. App. 8–9) that Sections 204 and 205 of the Communications Act were not applicable because the Commission had not purported to prescribe what rates were to be charged. The court also held (Pet. App. 9–12) that petitioner could not properly claim an abuse of discretion amounting to a denial of due process since it

had failed to attack the reasonableness of the proposed rates, a course specifically left open to petitioner in the Commission's Memorandum Opinion and Order denying the request for rehearing.

On October 27, 1965, the Commission issued a Memorandum Opinion and Order, instituting a comprehensive formal investigation into the lawfulness of Bell's charges for interstate and foreign communications service. *In re American Telephone and Telegraph Company,* F.C.C. Dkt. No. 16258, 2 F.C.C. (2d) 871. The order directed a hearing, and granted leave to intervene to various interested parties, including "any state regulatory body." On December 23, 1965, the Commission denied Bell's petition to set aside its order of investigation and announced the procedures to be followed in the investigation. 2 F.C.C. (2d) 142, 173. We are informed that petitioner has intervened in this proceeding and that formal hearings into Bell's rates and charges began on June 7, 1966.

ARGUMENT

From a practical standpoint, the Commission's order of October 27, 1965, instituting a formal investigation into the Bell System's rates and charges, provides all the relief which petitioner sought in its request to the Commission for rehearing. It had asked that without suspending or staying the rate reductions filed as a result of the Commission's meetings with Bell representatives, the Commission should treat them as the occasion for an investigatory hearing, in which petitioner could participate, into A.T. and T.'s interstate rate base, revenues and expenses, and rate

of return; into the separation of intrastate from interstate operations; and into the relationship between state and interstate rates (J.A. 11–12). The Commission's order of October 27, 1965, as implemented (2 FCC (2d) 142), provided for this, and in addition, authorizes an investigation into matters not raised in the application for rehearing but presented in the petition for certiorari (Pet. pp. 19–23)[2]—the relationship between the Bell System and the Western Electric Company.

Moreover, the court below was correct in holding that the $100,000,000 reduction in interstate tolls following the Bell System's meetings with the Commission, were not agency-prescribed rates subject to the rule-making and hearing requirements of the Admin-

[2] The Commission's investigation will be conducted in two steps. Phase 1 will consider the total revenue requirements of the Bell System's interstate and foreign communication services, and the rate-making principles and classifications which should control the contribution which each of the System's principal rate classifications should make to the revenue requirements. In connection with this, the Commission will consider whether the System's charges are unreasonable, whether they improperly prefer or discriminate against any class of user or any locality, whether the Commission should prescribe charges and, if so, what they should be. An interim decision will be entered on this phase. In Phase 2, the Commission will examine all other matters relating to a just and reasonable level of earnings for major classes of interstate operations. This will include investigation of "separation" between state and interstate plant and equipment costs; the System's practice of incorporating various costs into the rate base; and the reasonableness of the prices and profits of the Western Electric Company on the sale of equipment, supplies and services to the System and its affiliates. *In re American Telegraph and Telephone Co.*, 2 F.C.C. (2d) 142.

istrative Procedure Act, 5 U.S.C. 1003, 1006, 1007. The Federal Communications Commission Act contemplates that communications carriers will file rate schedules on their own initiative without awaiting approval of new or revised rates by the Commission. 47 U.S.C. 203. If questions are presented as to the lawfulness of such rates, either upon complaint of interested parties such as petitioner, or upon the Commission's own motion, the agency may hold a hearing with respect to a carrier's rates (47 U.S.C. 204), and upon appropriate findings, prescribe lawful rates. 47 U.S.C. 205. This method of rate regulation was established under the Interstate Commerce Act (*Arizona Grocery Co.* v. *Atchison T. & S.F. Railway Co.*, 284 U.S. 370, 383–386, 390) from which the pertinent common carrier provisions of the Communications Act were taken, S. Rep. No. 781, 73d Cong., 2d Sess., pp. 3–4; H. Rep. No. 1850, 73d Cong., 2d Sess., pp. 5–6.

A rate becomes Commission-made, *i.e.*, approved or prescribed by the agency within the meaning of Section 2(c) of the Administrative Procedure Act, only when the Commission by order adopts the rate as its own and makes it binding upon the carrier. Such government-prescribed rates preclude rate payers from seeking damages in subsequent proceedings. *Arizona Grocery Co.* v. *Atchison T. & S.F. Railway Co., supra.*[3] But where the agency does not intend to prescribe a binding rate, there is no "approval or * * * prescrip-

[3] The phrase "approval or prescription" in Section 2(c) of the Administrative Procedure Act was taken from the *Arizona Grocery* case, see S. Rep. No. 752, 79th Cong., 1st Sess., p. 39.

tion," even if the agency goes so far as to find that "proposed schedules are shown to be just and reasonable and are not shown to be otherwise unlawful," *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U.S. 671, 682, 686–687, or to authorize the filing of supplements to tariffs embodying its own plan of "carefully selected, moderate" increases. *Algoma Coal & Coke Co.* v. *United States,* 11 F. Supp. 487 (E.D. Va.). See, also, *Birmingham Slag Co.* v. *United States,* 11 F. Supp. 486 (N.D .Ala.); *Koppers Co,* v. *United States,* 132 F. Supp. 159 (W.D. Pa.).

Thus, the Commission's Public Notice of November 25, 1964, announcing that the Bell System would file new tariffs reducing its rates, was not "agency action" within the meaning of Section 2(g) of the Administrative Procedure Act. It did not legally bind the carrier to file the tariffs proposed or preclude it from filing new or revised tariffs on its own motion, or place upon any tariffs the stamp of official approval which would preclude rate payers from seeking reparations in a subsequent proceeding. On the contrary, in denying petitioner's application for rehearing, the Commission expressly held that the tariffs remain open to challenge on the ground of unreasonableness (J.A. 19–21). Petitioner has not questioned the rates on this ground.[4]

[4] The court below found it unnecessary to pass upon the legality of the Commission's "continuing surveillance" of communication carriers—the process of informal meetings in which interstate rates are discussed. This practice, which has been in use since the Commission's earliest days, is well known to Con-

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1966.

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gress. See, *e.g.*, F.C.C. Annual Report for 1937, p. 91; F.C.C. Annual Report for 1940, p. 30. Several Congressional hearings have taken up the subject of rate reductions flowing from informal discussions. Antitrust Problems of the Space Satellite Communications System: Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary Pursuant to S. Res. 258, 87th Cong., 2d Sess., pp. 282–283, 292–293, 698–757 (1962); Communications Satellite Legislation: Hearings Before the Senate Committee on Commerce on S. 2814, 87th Cong., 2d Sess., pp. 79–96 (1962); Progress Report of the Federal Communications Commission: Hearings Before the Subcommittee on Communications of the Senate Committee on Commerce, 88th Cong., 1st Sess. (1963). The Commission believes the procedure a lawful one in appropriate circumstances. The United States has had no occasion to take a position on this issue and we are satisfied that the question need not be reached on this record.

U.S. GOVERNMENT PRINTING OFFICE: 1966